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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STANDWOOD FRED ELKUS, Defendant and Appellant.	G055493 (Super. Ct. No. 13CF0291) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed with limited remand.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

In 2013, defendant Stanwood Fred Elkus fatally shot Dr. Ronald Gilbert in Gilbert's medical office. Defendant had long blamed Gilbert for his health problems after a surgical procedure he believed Gilbert had performed in 1992; a few days before the shooting, defendant had scheduled an appointment under an assumed name to see Gilbert. A jury found defendant guilty of first degree murder and found true the special circumstance allegation defendant murdered Gilbert while lying in wait or immediately thereafter. The jury also found true the sentencing enhancement allegation that, pursuant to Penal Code section 12022.53, subdivision (b), defendant personally used a firearm in the commission of Gilbert's murder. (All further statutory references are to the Penal Code.)

Defendant contends the trial court erred by instructing the jury with CALCRIM No. 3425 on unconsciousness. He also argues the trial court erred because the written set of instructions given to the jury did not include a copy of the standard version of CALCRIM No. 3425 that the trial court read to the jury before deliberations began. Finally, defendant contends that, given the retroactive application of the amendment to section 12022.53 since his sentencing hearing, the matter should be remanded to provide the trial court the opportunity to exercise its discretion whether to strike the personal use of a firearm sentencing enhancement.

We affirm the judgment of conviction. The trial court did not err by refusing defendant's proposed modification to CALCRIM No. 3425 because insufficient evidence supported the affirmative defense that, at the time defendant shot Gilbert, defendant was unconscious. Therefore, that a written copy of CALCRIM No. 3425 on unconsciousness might not have been included in the set of written instructions given to the jury does not constitute prejudicial error. On a point conceded by the Attorney General, we remand for the limited purpose of allowing the trial court to exercise its

discretion under section 12022.53, subdivision (h) whether to strike the personal use of a firearm sentencing enhancement.

FACTS

I.
DEFENDANT IS ANGRY WITH GILBERT ABOUT HEALTH PROBLEMS HE BELIEVES WERE CAUSED BY HIS 1992 SURGERY.

In 1992, defendant underwent a surgical procedure which he has since believed caused him several serious physical problems. Defendant has blamed urologist Dr. Ronald Gilbert for those problems.[1]

In 2003 or 2004, Wesley Sanders contacted defendant because he was interested in purchasing property defendant owned. During their discussions, defendant bought up "his prostate issues" and incontinence and appeared upset. Defendant asked Sanders how he had located him and Sanders told defendant about the database system he had used. Defendant gave Sanders the name of "a doctor" in relation to defendant's surgery and asked Sanders to look him up for defendant. Sanders refused because Sanders "didn't think it would be a good outcome." Sanders thought defendant was "pretty upset, so [Sanders] didn't know what would happen" if he helped defendant.[2]

In December 2012, defendant purchased a Glock .45 caliber semiautomatic handgun.

II.
DEFENDANT ATTEMPTS TO SEE GILBERT AT HIS MEDICAL OFFICE.

On January 22, 2013, defendant walked into Orange Coast Urology in Newport Beach where Gilbert practiced (the medical office) and asked surgery

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[1] Our record is unclear whether Gilbert was the physician responsible for the advice and treatment of which defendant complained.

[2] After Sanders learned about the homicide in Newport Beach involving a doctor on television, he recognized defendant and called Newport Beach detectives.

coordinator Lisa Delaney if he could see Gilbert. Delaney asked defendant why he wanted to see Gilbert and defendant told her that he had seen Gilbert before. He told Delaney that his name was Allen Gold. Delaney looked for an Allen Gold in the medical office's computer system but did not find information under that name. She told defendant she could not find him in the system and asked him to provide his contact information.

Delaney had a bad feeling about defendant. When she heard Gilbert's voice elsewhere in the medical office while she was helping defendant, she excused herself and went to tell Gilbert to stay out of sight. After Delaney completed the intake process with defendant and scheduled an appointment for him to see Gilbert on January 28, defendant left the medical office.

III.

DEFENDANT RETURNS TO THE MEDICAL OFFICE AND FATALLY SHOOTS GILBERT.

On January 28, 2013, defendant returned to the medical office and told Delaney he had an appointment with Gilbert. Delaney went into the back office and told Gilbert that defendant had returned and "he's still creepy." Medical assistant Gemma Robles took defendant into exam room No. 2. She had defendant sit down in the chair and she sat down on the stool to input information into his chart. She took his vitals and asked him to take off his jacket. She did not have any problem communicating with defendant. She stated he was "just like every patient. They just sit there and answer questions." When she was done, she told defendant "Dr. Gilbert will be with you soon"; defendant "just looked up at [her] and smiled."

After she left defendant and went to the lab in the medical office, Robles heard loud banging. She returned to exam room No. 2, knocked, and asked through the door if everything was okay. Defendant opened the door and Robles saw Gilbert lying on

the floor and blood everywhere. Defendant calmly told her, "I am insane. Call the police. I am insane." Robles told a coworker to call 911 and that Gilbert had been shot.[3]

Urologist Dr. Richard Holevas also heard the loud noise while he had being seeing patients at the medical office. He walked down the hallway and saw what had happened. Defendant told Holevas, "I'm crazy." Holevas told defendant to give him the gun. After defendant failed to comply, Holevas told defendant more forcefully that he had to give the gun to Holevas immediately. After manipulating the gun in some way, defendant handed it to Holevas. Holevas took the gun along with a bag. Holevas moved defendant to the next room. Holevas testified that defendant appeared calm and ordinary; he did not find defendant to be particularly odd. A security guard watched defendant while Holevas returned to Gilbert and unsuccessfully attempted to resuscitate Gilbert. Autopsy results later showed Gilbert had suffered 21 entrance and exit wounds from having been shot multiple times.

Newport Beach Police Officer Chad Grange was dispatched to the medical office. He saw Gilbert's body before he was directed to the exam room where defendant was calmly sitting in a chair staring at a wall; defendant had one leg crossed over the other, his hands were in his lap, and his fingers were interlinked. Defendant told Grange, "I am just crazy."

Defendant was cooperative and followed commands. Defendant asked for his blue bag to be brought to him, also stating he knew he should not be asking for favors because he was a murderer. Defendant said he could not believe he "really did it" and asked Grange if he had ever handled a murder case before. Grange walked defendant out to the patrol car waiting to transport defendant to jail. He handed defendant over to Newport Beach Police Officers Anthony Yim and Kelly Scheafer. Defendant continued

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[3] Robles testified that defendant had been very quiet and very calm. His face was expressionless. He never tried to escape.

to be cooperative and did not have trouble communicating; he appeared to understand everything that was being said to him.

IV.

DEFENDANT'S STATEMENTS TO THE POLICE OFFICERS IN THE PATROL CAR.

After he was seated in the backseat of the patrol car, defendant engaged in conversation with the officers. He initially commented, "I'm surprised you're friendly," "you should beat the shit out of me," and "you've never had a 75 year old murderer." He told the officers: "I had a bad operation 20 years ago. Don't go to your Urologist. Don't ever have them fool around with your prost[]ate. That's castration that's what it really is, you know." He also told them, "You know, I told him I didn't want a prostate surgery. I told him I didn't want prost[]ate surgery."

Defendant asked whether the officers brought his bag containing his medicine, stating that "[u]pstairs is a bag there" which contained his heart and thyroid medicine. After Yim told him he would "let the guys know," defendant responded: "I don't want you being nice. . . . I don't even like myself tell you the truth. Don't ever let a . . . don't go near a urologist all they want to do is operate. I told them I didn't want a prost[]ate operation. I told them I didn't want a prostate operation . . . I'm a barber I had customers all the time coming out of the barber shop telling them don't get a prost[]ate operation." The transcript of defendant's conversation shows defendant cried as he said, "It . . . so, so, so, stupid."

Defendant asked Scheafer if she had taken "that white paper out of [his] pocket?" After Scheafer said that she had, defendant stated: "There's important phone numbers on there for me. It's my family." He said, "I'm sorry for my family they'll be in shock." Defendant continued: "My boss used to complain about his prost[]ate after . . . he had four prostate operations. Four. At least he had kids. They didn't give me a chance to have any children. I told them I didn't have any children. I don't want a prost[]ate operation, twenty years ago. I wasn't a young guy but I felt young. I was a

young 54. I used to ride a bicycle. I worked seven days a week. That's the truth. I'd get a lie detector test on that."

Defendant further stated: "They're gonna go blame all this on the . . . on guns. That's a bad thing. If it wasn't for a pistol, I'd use a knife. I can't believe it." He said: "The only reason I didn't kill myself is I want this story told. Go to a urologist all they want to do is operate. I've had three operations, one was worse than the other. My boss had four operations. But at least he has three children before the operations."

Defendant complained, "what's taking so long?" in reference to his continuing to sit in the patrol car and not yet having been driven to the jail. After Yim stated, "I'm waiting for my boss to let me know when to head out," defendant responded: "There aren't any more criminals in here I don't think." Defendant commented on the presence of a fire truck at the medical office; he said he understood why there would be an ambulance present but did not understand why a firetruck was there because there was no fire. He stated: "I mean its taxpayer's money that's . . . I have nothing against the fire department or the police department."

Defendant and Yim then engaged in the following conversation:

"[Defendant]: Did the ambulance already leave?

"Yim: No, it's behind us.

"[Defendant]: Stupid question I should ask, is that guy dead?

"Yim: No, I don't know, we just came out to the parking lot here, so I haven't been . . . I don't know anything more than you know.

"[Defendant]: I'm sure these nurses there they can't understand what I did, why I did."

Defendant asked Yim whether he was waiting for his boss to physically arrive. He also asked whether Newport Beach had a different police chief than the police chief in Los Angeles. After Yim commented that Newport Beach has a different police chief and that Los Angeles was a "different town," defendant stated: "Yeah you got it

safe here [ex]cept for a crazy person like me, but everything here is nice and clean . . . I would have never let them operate anyway . . . just told me from the beginning that you're going home eight days with a Foley catheter. It says right in that . . . those papers there, patient cannot tolerate Foley catheter."

Defendant spoke at length about his challenges with a Foley catheter and how he had not been properly advised by medical staff before his surgery: "And those doctors, what they call the Hippocratic Oath, I call it the hypocritical, Hippocratic Oath, so you're not supposed to hurt anybody. They looked at me and other veterans like guinea pigs. I asked this guy Gilbert, I said I want the medicine to shrink the prost[]ate. On the Paul Harvey radio program I heard there's a new medicine out. This is in 1992 when I had the operation. Oh no that's not your problem, no, no, no you got a blockage in your urethra. Well it shows you right there in those papers, other doctors said no. And another doctor later on he's supposed to be a specialist at VA in urethral strictures. He says don't . . . we have people here in the VA that do not know how to read an x-ray. Then I showed him a piece of paper and he handed it back to me immediately. He says you emptied your bladder. I says well Don Gilbert told me I didn't empty my bladder, and that's why I came in. I had two women working with me in the barber shop, when I first started out there were no women in the barber business but this one gal she was very, very pretty. . . . And right after the operation I knew within two months, they asked me did you lose your sex drive? Oh that could have hit me with a knife. . . . I wasn't after her anymore."

Officer Brad Miller entered the conversation with defendant. He asked defendant, "Hey how are you sir?" Defendant responded, "I'm not good" and "I mean I am an old man, that doesn't mean you . . . I should get consideration." Defendant returned to discuss the subject of urologists, gynecologists, and surgery. Miller told defendant that they would be leaving soon and asked defendant if he wanted to "get out of here." Defendant responded, "Yeah I'd appreciate it very much." Miller said that they

would talk a little later and to "[t]ake care." Defendant stated, "I don't know why he called me sir, I'm a scumbag really. You just remember that. Don't let anybody operate on you."

V.

DEFENDANT'S STATEMENTS TO HIS NEPHEW.

Later that day, during the booking process, defendant called his nephew and told him he was at the police station. After his nephew asked what had happened, defendant explained: "I just shot a doctor. And the police are listening to me as . . . I'm talking to you. I'm down here at Newport Beach Police station. I know you're in shock. I was going to talk to your dad, but I'd rather talk to you first. I would say go over to my house, open it up, and look at all the paper work. Your mother is going to have to come home. And she's probably going to have to bring Kelly back, too." His nephew asked, "What do you mean you shot a doctor?" Defendant responded: "Like I'm telling you, exactly what I did. I shot a doctor. His name is Gilbert. Ron Gilbert. He's a urologist. He was responsible for my bad operation twenty years ago. I'm her[e] at the police station in Newport Beach."

After giving his nephew the police station's telephone number, defendant said: "I'm here forever, . . . I'm not getting out. I have the right to wait for a lawyer but that's not big deal." He told his nephew that everything he was saying was being overheard, and that the nephew will probably "see something on the television." He told his nephew that his car was at the medical office "where the incident took place" and that he needed to go pick it up. Defendant's nephew stated that he had been told defendant was depressed but "didn't know." Defendant interrupted, stating: "Very depressed. I've been depressed now for four or five months. My depression is like a man that's in a house that's on fire and I can't get out. Or somebody that fell into a pit on a sunny day and it's so deep I can't see the sunshine. And every time I walk outside, even on a sunny day, it still looks grey. Everything is grey. Do I feel suicidal? Yes I do. I would tell

your father immediately and rather than worry about me I would go to my house." He gave his nephew instructions about how to get into his house, told his nephew that he had made a video that will "tell you a lot," and told him to put everything in his name and his mother's name—"everything. Immediately."

VI.

DEFENDANT'S CAR AND RESIDENCE ARE SEARCHED.

During a search of defendant's car, police officers found a calendar with Gilbert's name on it and a note with directions to the medical office.

During a search of defendant's Lake Elsinore residence, police officers found: (1) a receipt for a Glock semiautomatic weapon; (2) handgun ammunition, (3) two shotguns; (4) a piece of paper with the written words "Ron F. Gilbert"; (5) a printout of Mapquest driving directions from the residence to the medical office's address; and (6) a calendar that had the entry on January 22: "Talked to Shelley. Tried to see Gilbert." Police officers also found a living trust document that had handwritten notes stating, "Shelley" and, ten lines down from that note, "I am incarcerated. You take over if I am in jail."

PROCEDURAL HISTORY

Defendant was charged in an information with murder in violation of section 187, subdivision (a). The information alleged, pursuant to section 190.2, subdivision (a)(15), that defendant intentionally murdered Gilbert by means of lying in wait. The information further alleged, pursuant to section 12022.53, subdivision (d), and within the meaning of sections 1192.7 and 667.5, that defendant intentionally and personally discharged a firearm that proximately caused Gilbert's death. During trial, with regard to the sentence enhancement allegation, the prosecutor elected to proceed under subdivision (b) of section 12022.53 that defendant personally used a firearm instead of pursuing the sentence enhancement allegation under subdivision (d) of that section.

The jury found defendant guilty as charged and found the lying in wait special circumstance allegation and the personal use of a firearm sentencing enhancement allegation true. Following trial on the issue of defendant's sanity, the jury found defendant was sane at the time he committed the murder.

The trial court sentenced defendant to a term of life in prison without the possibility of parole for the murder offense, plus a consecutive term of 10 years to life for the personal use of a firearm enhancement. Defendant appealed.

DISCUSSION

I.
THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S REQUEST FOR A MODIFIED INSTRUCTION ON UNCONSCIOUSNESS BECAUSE INSUFFICIENT EVIDENCE SHOWED DEFENDANT WAS UNCONSCIOUS AT THE TIME HE SHOT GILBERT.

In "the criminal mental state context," it is presumed "that a person who appears to act in an apparent state of consciousness is conscious." (*People v. James* (2015) 238 Cal.App.4th 794, 804 (*James*).) "Evidence raising a reasonable doubt as to whether the defendant was conscious at the time of acting is a complete defense to a criminal charge." (*Ibid.*)[4] "'To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist "where the subject physically acts but is not, at the time, conscious of acting."' [Citations.] The law is clear that in cases of unconsciousness caused by blackouts, involuntary intoxication, sleepwalking, or even epilepsy, an instruction is warranted where there is substantial evidence." (*Id.* at p. 805.)

Here, the trial court instructed the jury on the affirmative defense of unconsciousness with the standard version of CALCRIM No. 3425 which stated as

[4] Section 26 provides that "[a]ll persons are capable of committing crimes except those belonging to the following classes," which classes include, as set forth in paragraph 4 of the statute, "[p]ersons who committed the act charged without being conscious thereof."

follows: "The defendant is not guilty of any crime if he acted while unconscious. Someone is unconscious when he or she is not conscious of his or her actions. Someone may be unconscious even though able to move. [¶] Unconsciousness may be caused by involuntary intoxication. [¶] The defense of unconsciousness may not be based on voluntary intoxication except as discussed in CALCRIM 626. [¶] The People must prove beyond a reasonable doubt the defendant was conscious when he acted. If there's proof beyond a reasonable doubt that the defendant acted as if he were conscious, you should conclude that he was conscious, unless based on all the evidence, you have reasonable doubt that he was conscious, in which case you must find him not guilty."

Before trial, defendant requested that the trial court instruct the jury with a modified version of CALCRIM No. 3425 in which the fourth sentence of the standard instruction would be revised to state: "Unconsciousness may be caused by involuntary intoxication *or in an unsound mind, which includes any mental illness or neurological disorder*."[5] (Italics added.) The trial court denied defendant's modification request, stating: "[T]he court will give the standard instruction 3425 on unconsciousness. That accurately reflects the law."

At the end of trial, defendant renewed his request for the modified instruction on unconsciousness. The trial court again denied the request, stating: "I gave the [in]voluntary unconsciousness instruction out of an abundance of caution. And I think [the prosecutor] didn't object to it probably for the same reason. [¶] But the facts of this case are different from [*People v.*] *Gana* [(2015) 236 Cal.App.4th 598]. You know, *Gana* was a lady [who] was going through chemotherapy and, you know, she just freaked out during the chemotherapy and ended up shooting her husband. This is different. This

[5] Defendant originally requested that CALCRIM No. 3425 be modified in two additional respects. In his appellate opening brief, he states he "does not contest on appeal the trial court's refusal to give the other language requested for inclusion in CALCRIM No. 3425."

case here was 20 years of planning. And, you know, the factual situation in *Gana* was a lot different than this. [¶] And I gave the instruction, but I wasn't thrilled about the fact of—I really had some questions about whether the evidence in this case warranted it, you know, because it was the—you know, the circumstances of 20 years of basically premeditation and deliberation practically were such that it makes it completely—makes it a completely different fact situation. [¶] So—but, you know, out of an abundance of caution, I gave it. And I think [the prosecutor] didn't object for the same reason." The prosecutor stated he agreed with the court's statement. The court concluded: "That sometimes it's just better to give those instructions. You know, there was some argument based on that case, but the factual situation was different from *Gana* to this."

Defendant argues the trial court's decision to deny his request for the modified unconsciousness instruction constituted error. "An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law. [Citation.] The court reviews instructions in context of the entire charge of jury instructions rather than in artificial isolation." (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574; see *People v. Holt* (1997) 15 Cal.4th 619, 677.)

As explained in *James*, *supra*, 238 Cal.App.4th 794, "where unconsciousness stems from a mental illness or 'unsound mind,' what evidence is relevant to an unconsciousness defense has evolved in California case law over the last century, much like the evolution in the fields of psychology and mental illnesses themselves. For the first half of the 20th century, cases limited a defense of unconsciousness to individuals of 'sound mind' relying on the theory that the defenses of insanity and unconsciousness were mutually exclusive." (*Id.* at p. 806.) The court further stated: "More recent California Supreme Court cases appear to approve the defense of unconsciousness based on mental illness or unsound mind, although the court has not expressly disapproved" earlier cases holding otherwise. (*Ibid.*)

Although there remains some uncertainty about what evidence is sufficient to support instructing on unconsciousness when the alleged unconsciousness stems from a mental illness or "unsound mind" (see *James, supra,* 238 Cal.App.4th at pp. 805-810), there is no question that there must be, at a minimum, some evidence presented at trial that would permit a finder of fact to conclude that the defendant was "'not, at the time [of the offense], conscious of acting.'" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417 (*Halvorsen*).)

In *People v. Gana, supra,* 236 Cal.App.4th 598, a panel of this court concluded that the trial court erred by failing to instruct the jury on the defense of unconsciousness in a case in which a woman had fatally shot her husband. In that case, the defendant testified that she had "only a limited recollection of the event" and stated she remembered holding the gun and hearing a shot. (*Id.* at p. 609.) She testified that she did not remember loading the weapon and did not remember aiming and firing the gun at any of the victims. (*Id.* at p. 604.) In addition, there was evidence that just after the shootings, the defendant exclaimed, """What—what did I do[?]""" (*Id.* at p. 602.) Lay witness testimony stated that when the defendant shot her husband, her eyes were wide open but her face lacked emotion, and that when she was interviewed by police and attended to by paramedics, she had a "'thousand mile stare'" and was unresponsive. (*Id.* at pp. 602-603, 609.) An expert witness testified about the possible effects of the numerous medications that the defendant was taking at the time of the incident. The expert witness "identified the medications [the] defendant was taking to combat cancer and to overcome the adverse effects of the chemotherapy, and explained how these medications could affect her mental state." (*Id.* at p. 610.) The expert "concluded [the] defendant was suffering from a psychosis likely caused by 'a combination of events, combination of factors, including both her depression as well as the medications that she was taking,'" and further concluded that "'[i]t appear[ed] that she was experiencing a delirium, which is a kind of fluctuating level of consciousness, due to medical illness that

caused her to . . . have worsening symptoms of depression and worsening psychoses.'" (*Id.* at p. 610.)

In *James, supra,* 238 Cal.App.4th 794, in which the defendant was charged with aggravated mayhem and assault likely to produce great bodily injury, the appellate court concluded sufficient evidence supported instructing the jury on unconsciousness when evidence showed the defendant, who had a previous head injury resulting in a seizure disorder, attempted to climb the exterior of a building, hit his head on cars and garbage cans, took off his clothes, and bit a stranger in the face. (*Id.* at pp. 800, 809-810.) In addition, expert testimony showed the defendant had experienced an episode of psychosis in which he lost touch with reality.

In *Halvorsen*, the California Supreme Court concluded the trial court properly refused to give an unconsciousness instruction because insufficient evidence showed the "defendant was not conscious of his criminal actions within the meaning of section 26" in his commission of several crimes including first degree murder. (*Halvorsen*, *supra*, 42 Cal.4th at p. 419.) In that case, the defendant suffered from bipolar disorder exacerbated by intoxication. (*Id.* at p. 417.) He argued an instruction on unconsciousness was warranted in light of evidence that, immediately after committing the offenses, defendant experienced strange sensations, which he asserted were suggestive of an altered state of consciousness combined, inter alia, with his testimony that he did not consciously or intentionally pull the trigger. (*Ibid.*)

The Supreme Court rejected the defendant's argument: "The trial court properly refused the requested instructions. Defendant's own testimony makes clear that he did not lack awareness of his actions during the course of the offenses. The complicated and purposive nature of his conduct in driving from place to place, aiming at his victims, and shooting them in vital areas of the body suggests the same. That he did not, by the time of trial, accurately recall certain details of the shootings does not support an inference he was unconscious when he committed them. . . . [D]efendant in this case

testified in sharp detail regarding the shootings. That he earlier had told Dr. Vicary he did not remember them does not, without more, suggest his testimony about the crimes was mere confabulation. In sum, because defendant presented no substantial evidence he was unconscious when he committed the offenses, the trial court did not err in refusing the instructions on unconsciousness as a complete defense." (*Halvorsen, supra,* 42 Cal.4th at p. 418.)

Here, the evidence of defendant's conduct before and after the shooting, and defendant's statements to police and his nephew about the shooting shortly after it had occurred, as in *Halvorsen,* show defendant did not lack awareness of his actions when he fatally shot Gilbert. The evidence defendant was conscious of his actions the day of the shooting is extensive and undisputed. The evidence shows defendant engaged in considerable prior planning as he purchased the handgun the month before Gilbert's murder, recorded the date of his meeting with Gilbert in his calendar, printed out Mapquest directions to the medical office, and got his personal business in order at his residence in anticipation of his being indefinitely incarcerated after he carried out his plan of killing Gilbert. On January 22, 2013, defendant used a false name at the medical office in an effort to gain access to Gilbert. When he was turned away and told he had to schedule an appointment, he did so and returned a few days later as so scheduled. Witnesses testified defendant was calm and rational; he answered questions appropriately. Defendant consistently maintained a clear recollection of what he had done after the shooting. He discussed his motive with the police officers in the patrol car, stated he understood why an ambulance would be present and asked whether "the guy" was dead. He later informed his nephew that he shot Gilbert and provided his nephew with detailed instructions about how to deal with his car and financial affairs. Nothing in the record suggests that on the day of the shooting, defendant was anything other than conscious of his surroundings, his actions, and the actions of those who responded to the shooting.

In support of his argument that sufficient evidence supported giving a modified instruction that expressly stated that unconsciousness can be caused by an unsound mind, defendant cites the expert witness testimony that defendant was suffering from dementia at the time of the crime. The expert stated: "My opinion is the combination of medications that [defendant] was taking, both the over-the-counter ones as well as the prescribed ones, in conjunction with the fact that he's got a damaged brain, this led to his behavioral disinhibition. [¶] It's called what we consider to be hypomania which means it's not quite manic, but it means that you're more irritable, you're not sleeping, you've got more energy, your thoughts are racing really fast on you. Those are the things he described to me. Those are known side effects of the medicines he's taking. And then in addition to that, he's got a behavioral disinhibition problem from his brain. [¶] So that's my opinion in terms of what was going on at the time that this happened."

Although the expert witness's testimony shows defendant suffered some mental health issues, it does not speak to defendant's *consciousness* at the time he shot Gilbert. (See *People v. Froom* (1980) 108 Cal.App.3d 820, 830 ["mere evidence of mental disease or defect, without more, does not raise the defense of unconsciousness and does not entitle the defendant to instructions on that issue"].) As discussed *ante*, no evidence showed defendant was unconscious of his actions when he shot Gilbert, which actions he was able to recount upon his arrest. Defendant's ability to recollect what happened negates the inference he was unconscious at the time.

Consequently, the trial court did not err by failing to provide the requested modified version of CALCRIM No. 3425 because insufficient evidence supported the unconsciousness affirmative defense—whether described by the standard version of CALCRIM No. 3425 or by the modified version of that instruction defendant proposed.

II.

BECAUSE INSUFFICIENT EVIDENCE SUPPORTED AN UNCONSCIOUSNESS INSTRUCTION, THAT CALCRIM NO. 3425 WAS MISSING FROM THE WRITTEN PACKET OF JURY INSTRUCTIONS DID NOT HARM DEFENDANT.

Only one of the six sets of written jury instructions given to the jury was preserved after trial. That set did not include CALCRIM No. 3425 even though the trial court had orally instructed the jury on unconsciousness with the standard version of that instruction. Because there is no evidence the jury was provided a written copy of CALCRIM No. 3425, defendant contends it must not have been given to the jury thereby causing him prejudice.

Because we conclude that insufficient evidence supported instructing the jury on the affirmative defense of unconsciousness with CALCRIM No. 3425 in the first place, any failure to provide the jury with a written copy of that instruction was not prejudicial.

III.

THE MATTER MUST BE REMANDED UNDER SENATE BILL NO. 620.

The trial court imposed the personal use of a firearm sentencing enhancement under section 12022.53, subdivision (b). Defendant argues that the matter should be remanded to allow the trial court the opportunity to exercise its discretion to strike the firearm sentencing enhancement; the Attorney General concedes that defendant's argument has merit. We agree.

Before the enactment of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682), trial courts were prohibited from striking firearm enhancements under section 12022.53. Since defendant's sentencing hearing, section 12022.53 has been amended to give the trial court discretion to strike an enhancement in the interests of justice. (§ 12022.53, subd. (h).) This change in sentencing law applies retroactively to defendant's case. (*People v. Chavez* (2018) 22 Cal.App.5th 663.)

It is therefore appropriate that we remand the matter to allow the trial court the opportunity to exercise its discretion regarding that sentencing enhancement.

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court the opportunity to exercise its discretion regarding the striking of the personal use of a firearm sentencing enhancement and, if appropriate following the exercise of that discretion, to resentence defendant and provide a corrected abstract of judgment to the appropriate agencies. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.